

February 3, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ivan Rolig

Date of Filing: November 24, 2003

Case Number: TFA-0046

Ivan Rolig filed an Appeal from a determination that the Nevada Site Office of the National Nuclear Security Administration (NNSA) issued on November 14, 2003. In that determination, the Nevada Site Office denied a request for information that the Appellant had submitted on October 27, 2003, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. That information was withheld after the Nevada Site Office determined that the document contained unclassified controlled nuclear information (UCNI). This Appeal, if granted, would require the DOE to release the information that the NNSA withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On October 27, 2003, Mr. Rolig requested, among other documents, a copy of the *Safety Analysis Report for the Device Assembly Facility at the Nevada Test Site, Las Vegas, Nevada*, DAF SAR-001-193-5394C, dated March 1995. The Nevada Site Office, which had control over that document, responded to the request by withholding the entire 229-page document from Mr. Rolig. In his November 14, 2003 determination letter, the director of the Nevada Site Office's Office of Public Affairs stated that the document contained UCNI, the disclosure of which is restricted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and therefore warranted protection from disclosure under Exemption 3.

The present Appeal seeks the disclosure of the report described above. In his Appeal, Mr. Rolig contends that "[t]he report is an unclassified document and should be made available

to [him] in the best interest of the public.” He also states that the Atomic Energy Act itself provides for the release of information to “insure the continued conduct of research and development and training . . . and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge.”

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 29 DOE ¶ 80,171 (2004); *National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed the document that Mr. Rolig requested.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, the requested document contains UCNI. The information that the DOE identified as UCNI concerns the security details, floor plans and design specifications of a building that is used in atomic energy defense programs. The DOE also determined, however, that the majority of the document's content is not UCNI. The Director has provided this Office with a copy of the document from which the UCNI has been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is Marshall O. Combs, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Director has now determined to be properly classified must be withheld from disclosure.

Nevertheless, the Director has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Director's findings, and at his suggestion, we have remanded this document to the Nevada Site Office for a new review, in which it must consider whether the FOIA dictates that other, previously withheld portions of the document should not be released to Mr. Rolig. After completing its review, the Nevada Site Office should either release the currently redacted version of the requested document or issue a new determination that provides adequate justification for the withholding of any additional information from the document it provides to Mr. Rolig. Mr. Rolig will have the opportunity to appeal that determination, if he so desires. Accordingly, Mr. Rolig's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Ivan Rolig on November 24, 2003, Case No. TFA-0046, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The Nevada Site Office of the National Nuclear Security Administration shall review the redacted version of the document entitled *Safety Analysis Report for the Device Assembly Facility at the Nevada Test Site, Las Vegas, Nevada*, DAF SAR-001-193-5394C, dated March 1995, bearing markings indicating where all Unclassified Controlled Nuclear Information has been properly deleted. Upon completing its review, the Nevada Site Office shall either release that redacted version in its entirety or issue a new determination that provides adequate justification for the withholding of any additional information from the copy it provides to Mr. Rolig.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 3, 2005